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ALEXANDER L. STEVAS,
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No. 80-1951

IN THE
Supreme Court of the United States

October Term, 1980

THEODORE B. MOORE,
Petitioner,

v.

THE CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER, consisting of Leo Cardenas, Francis H. Salter, and Alfred Wood; CHARLES BROWN; F. SAM MACDONALD; JOSEPH PETTIT; J. DOUGLAS McCLUSKIE; JOHN A. SBARBARO; and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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QUESTIONS PRESENTED FOR REVIEW

1. Does the review by Colorado courts of an administrative board's decision regarding a municipal employee under the standard of "any competent evidence", while affording a state employee review under the standard of "substantial evidence", violate the municipal employee's rights under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

2. Does the effect of an administrative board's decision which effectively bars the defendant from a suit for damages in a state court effectively deny his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution?

TABLE OF CONTENTS

Questions Presented for Review	i
Jurisdictional Statement	1
Statutory and Rule References	2
Statement of the Case	3
Argument	6
Appendix	11

TABLE OF CASES AND OTHER AUTHORITY

Bishop v. Wood, 426 U.S. 341 (1976)	9
Board of Regents v. Roth, 408 U.S. 564 (1972)	9
Codd v. Velger, 429 U.S. 624 (1977)	9
Cooper v. Civil Service Comm., 604 P.2d 1186 (Colo. App. 1979)	6
Lassner v. Civil Service Commission, 177 Colo. 257, 493 P.2d 1087 (1972)	6
Morrissey v. Brewer, 408 U.S. 471 (1972)	9
Petrafeck v. Industrial Comm., 191 Colo. 566, 554 P.2d 1097 (1976)	7

Precious Metals Assoc. v. Commodity Futures Trading Comm., 620 F.2d 900 (1st Cir. 1980) 10

Colo. Rev. Stat. 1973 24-4-106(7) 2

Colo. R. Civ. P. 106(a)(4) 3, 6

28 U.S.C. Section 1257(3) 1

COMES NOW the petitioner, Theodore B. Moore, by and through his attorney, Bradley J. Yoder, and hereby petitions the United States Supreme Court for the issuance of a writ of certiorari in this matter to the Supreme Court of the State of Colorado.

JURISDICTIONAL STATEMENT

Review is sought of the denial on January 5, 1981 of the petitioner's petition to the Colorado Supreme Court for review of the judgment of the Colorado Court of Appeals dated September 4, 1980. Neither the denial nor the Court of Appeals' opinion were officially published and copies are appended hereto.

On December 28, 1978 the defendant Career Service Board issued a ruling sustaining the petitioner's suspension from employment with the defendant City for

five days, and denying other grievances of petitioner. The petitioner filed an action in the District Court for the City and County of Denver seeking review of the Board's decision and other relief. The District Court affirmed the Board in a minute order on August 15, 1979, a copy of which is appended hereto.

The District Court's decision was then appealed to the Colorado Court of Appeals, which affirmed the District Court. Petitioner's motion for rehearing in the Court of Appeals was denied on October 2, 1980.

The statutory provision conferring jurisdiction in this matter is 28 U.S.C. Section 1257(3).

STATUTORY AND RULE REFERENCES

Colo. Rev. Stat. 1973 24-4-106(7), which is part of the Colorado Administrative Procedure Act applicable to state

employees, provides in part:

> If the court finds that the agency action is . . . unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action . . . .

Colo. R. Civ. P. 106(a)(4), which is applicable to actions involving municipal employees, provides in part as follows:

> In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in these rules:
> * * *
> (4) Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy.

STATEMENT OF THE CASE

The petitioner is employed as a health sanitarian by the defendant City. In 1976 he was suspended for five days for refusal to sign an erroneous notice regarding

building violations. The defendant appealed the suspension and several incidents of harassment by supervisors to the Career Service Board. At the hearing before the Board, the petitioner presented substantially uncontroverted testimony and exhibits concerning the justification for his refusal to sign and concerning the validity of his grievances.

The petitioner filed an action in the District Court seeking to overturn the Board's action and requesting damages against the other defendants. The District Court affirmed the Board and later dismissed the petitioner's action.

In his brief to the District Court, petitioner contended that the scope of review should be whether the Board's action was "unsupported by substantial evidence when the record is considered as

a whole." (Brief of Plaintiff, p. 6) The respondents asserted in their Trial Brief that the standard should be whether there was "any competent evidence" to support the Board's action. The District Court affirmed without indicating the standard applied. The Court of Appeals ruled that the "any competent evidence" standard was applicable.

The petition for certiorari filed with the Colorado Supreme Court again asserted the proper standard to be that of substantial evidence. The denial of certiorari did not indicate any ruling on the contention.

The denial of certiorari by the Colorado Supreme Court effectively foreclosed the petitioner from seeking other relief such as damages in the District Court.

ARGUMENT

There appears to be no rational reason why a municipal employee such as the petitioner should be given only the "any competent evidence" review by the district and appellate courts of Colorado, while a state employee is entitled to review under the "substantial evidence" standard.

In Lassner v. Civil Service Commission, 177 Colo. 257, 493 P.2d 1087 (1972), where a state employee was involved, the Colorado Supreme Court set aside an agency action where the record was unsupported by substantial evidence when the record as a whole was considered. However, in Cooper v. Civil Service Comm., 604 P.2d 1186 (Colo. App. 1979), the court concluded that the standard for review in a case involving a municipal employee under a Colo. R. Civ. P. 106(a)(4) action was "any

competent evidence".

The Colorado Supreme Court has itself indicated in Petrafeck v. Industrial Comm., 191 Colo. 566, 568, 554 P.2d 1097 (1976) that

> the constitutional minimum under the Equal Protection Clause is that a distinction between ostensibly similar classes must be rationally related to a legitimate state objective.

There do not appear to be any real differences between the situation of a municipal and state employee so as to justify the different standard of review accorded to government employees by the same state courts. Whether the interest of the petitioner Moore in this matter is classified as fundamental or otherwise, there does not appear to be any rational purpose furthered by the differing standards of review.

Several compelling reasons exist for a strict examination of the differing standards applied in Moore's case. The suspension has become a part of Moore's personnel record with the City and may be a barrier to further promotion with the City. Also, due to the specialized nature of his job as a sanitarian, his other employment opportunities are limited, and any other potential employers could be expected to examine carefully his record. The likelihood of his not being hired in view of the suspension must be acknowledged.

Perhaps most importantly, the lack of sufficient review by the courts means that public employees who are properly doing their jobs in the public interest may expect little protection from overbearing supervisors. Moore refused to sign a

notice which overlooked serious structural deficiencies in a residence. Affording only the "any competent evidence" standard is a clear sign to other public employees that they cannot resist supervisors even when the supervisors are wrong.

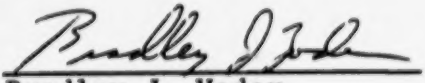
It has been recognized that the creation and dissemination by an employer of a false and defamatory impression about an employee gives rise to certain procedural due process rights. See Codd v. Velger, 429 U.S. 624, 628 (1977), Board of Regents v. Roth, 408 U.S. 564 (1972), and Bishop v. Wood, 426 U.S. 341 (1976).

As noted in Morrissey v. Brewer, 408 U.S. 471, 481 (1972), "once it is determined that due process applies, the question remains what process is due." In light of the important interests of Moore which are involved, a more stringent

standard than "any competent evidence" should be required.

Likewise, the foreclosing of Moore's pursuing a suit for damages on account of the adverse administrative ruling disregards his rights to due process and equal protection. As noted in Precious Metals Assoc. v. Commodity Futures Trading Comm., 620 F.2d 900 (1st Cir. 1980), "due process mandates that an administrative hearing will constitute a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law." 620 F.2d at 910. Where the administrative proceeding effectively deprives one of the right to suit for damages, it can hardly be contended that a "fair trial" has occurred.

The foregoing Petition for Writ of Certiorari and accompanying Appendix are hereby respectfully submitted.



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APPENDIX

The following "Findings and Order" were entered by the Career Service Board on December 28, 1978:

THIS MATTER coming on and before the Career Service Board of the City and County of Denver on May 15, 1978, August 7, 1978, September 7, 1978, October 12, 1978 and November 20, 1978; and the Board having conducted a full and complete hearing into the above entitled cause; and having heard

arguments presented whereby the Board is duly advised in the premises; the Board does hereby find, order and decree:

1. The Board finds that by agreement between the appellant, Mr. Theodore B. Moore, and the Department of Health and Hospitals, the following matters are properly before the Career Service Board:

(a) Five-day suspension from September 20, 1976 through September 24, 1976.

(b) Denial of a proficiency pay increase to be effective October 1, 1976 due to below standard employee performance report.

(c) Bumping incident on September 28, 1976.

(d) Letter from Dr. McCluskie threatening disciplinary action dated September 8, 1976.

(e) Grievance regarding the inspection of 2832 Elm Street.

2. The Board finds that the grievance regarding the inspection of 2832 Elm Street is without merit. No disciplinary action was taken by the supervisor against the appellant. The supervisor merely called the appellant's attention to certain items which had evidently been overlooked.

3. The Board finds that the bumping incident involving the appellant and his supervisor was nothing more than a case of two people trying to go through a door at the same time with neither person paying attention. The Board finds neither party to be at fault.

4. The Board finds that the denial of a proficiency pay increase effective October 1, 1976 as a result of a below standard employee performance report is

not properly before the Board because it does not fall within the limited appeal rights under Career Service Personnel Rule 7-46.

5. The Board finds that the letter from Dr. McCluskie dated September 8, 1976 was a proper order from Dr. McCluskie to the appellant which put the appellant on notice that if he did not comply with a lawful order of his supervisor, the appellant would receive disciplinary action.

6. The Board finds, based upon the most credible evidence presented and the exhibits, that the five-day suspension was proper under the circumstances. The actions of the appellant which caused the suspension were of such a nature that the suspension was warranted.

7. The Board finds that the evidence does not support an allegation of harassment.

NOW, THEREFORE, THE BOARD DOES FIND, ORDER AND DECREE that the appeal of Mr. Theodore B. Moore be denied and that the action of the Department of Health and Hospitals be sustained.

This being the unanimous decision and order of the Career Service Board members present - Mr. Leo E. Cardenas, Mr. Francis H. Salter and Mr. Alfred Wood - the Board does hereby adopt the same on the 28th day of December, 1978.

BY THE BOARD:
(Signed)
LEO E. CARDENAS -
Chairman

- -

The following minute order was entered by the District Court for the City and County of Denver, the Hon. John Brooks, Jr., presiding, on August 15, 1979:

THEODORE B. MOORE VS CAREER SERVICE BD. OF C & C

Matter taken from under Advisement
Ord: Ruling of the Bd. affirmed

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The following opinion was filed and judgment entered by the Colorado Court of Appeals on September 4, 1980:

This is a C.R.C.P. 106 action arising from a denial of plaintiff Moore's grievances by the Career Service Board of the City and County of Denver. Moore is a building inspector for the City and County of Denver, and the grievances in question concern several disputes or altercations he had with his superiors and co-employees. His principal objection was the refusal of the Board to cancel a five-day suspension from his employment that had been ordered by his superiors as a punishment for the alleged insubordination. The district court approved the action of the Career Service Board, and we affirm the district

court.

The initial issue on appeal is the scope of judicial review under C.R.C.P. 106(a)(4). Citing Lassner v. Civil Service Commission, 177 Colo. 257, 493 P.2d 1087 (1972), Moore asserts that the proper standard of review is that of "substantial evidence." The Lassner standard, however, is only applicable to reviews of administrative proceedings when they are brought under the State Administrative Procedure Act, Section 24-4-101, et seq., C.R.S. 1973. Where, on the other hand, there is a review of a city or county agency under C.R.C.P. 106, the standards of the State Administrative Procedure Act do not apply. Section 24-4-107, C.R.S. 1973; Chroma Corp. v. Adams, 36 Colo. App. 345, 543 P.2d 85 (1975).

Thus, under the circumstances before us, the proper standard of review is set forth in Cooper v. Civil Service Commission, _____ Colo. App. _____, 604 P.2d 1186 (1979), where it was stated that:

> "The standard of review under Rule 106(a)(4) of final administrative action is whether, on the basis of the whole record, the ultimate findings of the agency are supported by any competent evidence."

II

Using this standard of review, we consider the second issue raised by Moore -- whether there is competent evidence in the record to support the findings of the Board. We conclude that there was.

The most significant dispute between Moore and his supervisors related to his refusal to sign an order pertaining to certain building violations which he had prepared but which had been modified by

his supervisor. Moore admits that the matters set forth in the order which he refused to sign were correct as far as they went. While it is true that the evidence shows that there were other probable building violations which could have been included in this order, there is no showing that the order itself was based on false information, or that the additional alleged violations could not or would not have been contained in later orders.

Moore's refusal to sign this order, combined with other allegations of violations of personnel rules based on a number of other separate incidents, was sufficient competent evidence to warrant the suspension. The facts as to these additional incidents were hotly disputed in the evidence, but the Board's resolution of these

factual matters is binding upon us. See Cooper v. Civil Service Commission, supra. Furthermore, if Moore did not agree with the contents of the order he was asked to sign, there were grievance procedures available to him under the personnel rules enacted by the Board of which he did not avail himself.

Finally, Moore cites as error the Board's ruling denying his grievance on the denial of a proficiency pay increase. The granting or denial of a proficiency pay increase is a matter of discretion with the Department heads. The only authorized ground for appeal of a denial of the increase is stated in Personnel Rule 7-26 of the City's Personnel Rules. This section allows an appeal only on the grounds of discrimination because of race, color, creed, national origin, or politi-

cal opinion or affiliation. No evidence of these grounds appears in the record, and therefore, the Board properly denied Moore's grievance as to this issue.

Judgment affirmed.

JUDGE COYTE and JUDGE RULAND concur.

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On January 5, 1981, the Colorado Supreme Court entered the following order:

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

By the Supreme Court
Sitting En Banc

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